Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-215

STATE OF NEW YORK,

Petitioner,

v.

WILLIAM ABRUZZI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals of the State of New York (Pet. App. A) is reported at 42 N.Y.2d 313. The opinion of the New York State Supreme Court, Appellate Division (Pet. App. B) is reported at 52 A.D.2d 499, 385 N.Y.Supp.2d 94. The decision of the County Court of Dutchess County (Pet. App. D) is not reported.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 12, 1977. The petition for writ of certiorari was filed on August 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

Whether police officers on their own initiative and without a warrant may enter on to private property and peep through heavily curtained windows into a room used by a physician for the examination of female patients?

Statement

On January 30, 1974, respondent, a licensed physician of the State of New York was conducting his private practice of medicine in an office building which he owned in Wappingers Falls, New York. On that evening, New York State police officer James Apolinario, without a search warrant, entered the backyard area of respondent's building, mounted a ladder which he had brought with him and began peeping into the heavily curtained windows of the doctor's physical examination rooms.

The police officer alleged that his purpose was to observe respondent's examination of an undercover policewoman in one of the examination rooms.* However, he

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*It should be noted that the trial court in denying respondent's motion to suppress refused to conduct an evidentiary hearing concerning the circumstances of the original warrantless surveillance. The court relied solely on the police officer's version of those events that was contained in a subsequent application for a warrant to search respondent's offices. Thus, even if the court were to accept all of petitioner's legal arguments, it would still be necessary to remand the case for an evidentiary hearing.

spent approximately 35 minutes peeping into an adjoining examination room where a female patient was lying on an examination table with her feet in stirrups and covered by a white cover. The police officer stated that during his 35 minute surveillance of this room, he saw respondent and the patient engage in a conversation which he could not hear, and thereafter respondent engaged in certain sexual acts with the patient.

On the basis of these observations, the police subsequently obtained a search warrant for respondent's offices, which was executed on January 31, 1974. On March 26, 1974, respondent was indicted on five counts charging violations of the sexual abuse provisions of the penal law of the State of New York. After unsuccessfully moving to suppress the evidence obtained during the warrantless surveillance of January 30, 1974, as well as the fruits of that illegal search, respondent pleaded guilty to one count of the indictment against him and was thereafter sentenced to an indeterminate term in prison of 0-5 years.

On appeal of the denial of respondent's motion to suppress the evidence against him, the Appellate Division, Second Department reversed, finding "no exigencies of law enforcement which would justify a police investigator's initial entry without a warrant." (Pet. App. B, p. 16). The Court of Appeals affirmed.

Argument

Although petitioner attempts to portray this case as raising significant issues concerning the right of the police to take reasonable efforts to protect undercover operatives, the real issue presented is whether the police can enter upon private property and peep into a physician's examination room without first obtaining a judicial warrant authorizing such conduct.

The very careful opinion of the Appellate Division, adopted by the New York Court of Appeals, does not in any way denigrate the importance of protecting undercover police officers. It holds simply that where, as here, "the investigation which lead to the police trespass was not sudden but stemmed from complaints as far back as a year and a half before the incident in question" (Pet. App. B, p. 16), the police were not justified in undertaking the search in question without first having obtained a judicial warrant.

The decision below is therefore totally consistent with the prior decisions of this Court. Indeed, only this year in *United States* v. *Chadwick,* Docket No. 75-1721, decided June 21, 1977, 21 Cr. L. Rep. 3169, this Court reaffirmed the basic principles that:

> "The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States,* 333 U.S. 10, 14 (1948)."

The petition itself demonstrates that insistence on a judicial warrant as a prerequisite to a visual surveillance of a doctor's examination room will not frustrate legitimate police efforts. On page 9 of the Petition, reference is made to the case of *People* v. *Teicher* (N.Y.L.J. of June 13, 1977, p. 12, New York County Sup. Court), in which the District Attorney of New York County obtained a warrant in order to gather evidence of the same type of conduct at issue here. Petitioner offers no excuse for the failure to obtain such a warrant here.

It is ironic that petitioner cites *Katz* v. *United States,* 389 U.S. 347 (1967) in an attempt to justify the warrantless surveillance of a physician's private examination

room (see Petition, p. 8). In *Katz* this Court rejected the argument that law enforcement officers had the right to conduct a reasonable electronic surveillance of a public telephone booth without a warrant stating:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."

Finally, there is no merit to petitioner's argument that the decisions below are inconsistent with several cases holding that where police officers have illegally entered a premises, they may nonetheless testify concerning assaults to themselves or attempts to bribe them (Pet. App. B, p. 11). The Appellate Division expressly noted these decisions and found them inapplicable to the facts at issue, stating:

> "It should be noted that our decision today has neither the intention nor the practical effect of insulating defendants from evidence of criminal activity directed toward a trespassing police officer. In all cases cited by the dissent in support of its independent crime theory, the independent crime was directed

toward the police officer himself. As to those kinds of crimes, the testimony of the police officer is undoubtedly admissible, for the Fourth Amendment is not a vehicle for license to commit crimes against or through the police, regardless of where such crimes occur." (Pet. App. B, p. 18).

Obviously, an individual in the physical presence of a police officer illegally on the premises has no reasonable expectation of privacy when he attempts to bribe or assault that officer.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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